(s) based on the authorities cited and on the facts of this case, I would hold that despite the requisition of the Public Prosecutor, since the case had been partially heard in the Sessions Court, the order of transmission to the High Court is illegal, void and of no effect and the case should continue in the Sessions Court.

Order accordingly.

Solicitors: *Mutty & Co.; Wan Harun; Sukri & Nordin.*

PUBLIC PROSECUTOR v. PHON NAM

[O.Cr.J. (Peh Swee Chin J.) December 18, 1986]

[Ipoh – Perak Criminal Trial No. 5 of 1984]

Criminal Law and Procedure – Criminal trial – Charge of trafficking in dangerous drug – Chemist's report – Chemist not called as witness – No evidence of service of Chemist's report on accused – Accused acquitted – Criminal Procedure Code (F.M.S. Cap. 6), s. 425.

Dangerous Drugs – Evidence – Chemist report – No evidence of service on accused – Dangerous Drugs Act 1952, s. 39B(1).

In this case the accused was charged with trafficking in heroin, an offence under the Dangerous Drugs Act. At the trial evidence was given that the substances found by the police in regard to which the accused was charged were sent to the Chemistry department for analysis and the report of the Chemist was tendered in evidence. However no evidence was given of the service of the Chemist's reports on the accused by the police officer who was alleged to have served them on the accused. At the end of the prosecution case counsel for the defence said he would reserve his submission until the end of the whole case. The court then recessed to consider whether there was a *prima facie* case for the accused to be called. When hearing resumed the trial judge drew the attention of the learned Deputy who was prosecuting the case that the police officer had never given evidence about the service of the Chemist's report on the accused. The learned Deputy applied for leave under section 425 of the Criminal Procedure Code to call the police officer but this was refused.

Held: (1) as there was no evidence of the service of the Chemist's report on the accused and neither was the Chemist called to give evidence, the position at the close of the prosecution case was that there was no sufficient evidence to prove the essential ingredient that the substances the accused was alleged to have trafficked in were in fact heroin;

(2) having regard to all the circumstances including the court's view of the effect of the system of trial being adversarial the court did not exercise its discretion to invoke section 425 of the Criminal Procedure Code.

Cases referred to:

(1) *Ramli bin Kechik* v. *Public Prosecutor* [1986] 2 M.L.J. 33.

(2) *Public Prosecutor* v. *Yeoh Chuan Joo* (unreported)

(3) *Maxwell* v. *Director of Public Prosecutions* [1935] A.C. 309, 323.

CRIMINAL TRIAL.

Tun Abdul Majid bin Tun Hamzah (Deputy Public Prosecutor) for the prosecution.

Karpal Singh for the accused.

Cur. Adv. Vult.

Peh Swee Chin J.: The accused was acquitted and discharged without his defence being called on a legal point based on some evidence not disputed by both the prosecution and defence, and such being the case, apart from stating the barest outline of the prosecution case as a whole, but stating in detail the aforesaid undisputed evidence, it will not be necessary to set out the details of the whole prosecution case.

The accused was charged with trafficking in 128.80 grammes of heroin under section 39B(1) of the Dangerous Drugs Act. It cannot be gainsaid that it would be vital for the prosecution to prove that the substances which the police suspected to be heroin were in fact heroin, a vital ingredient of the offence in question. I do not think it necessary to cite any authority for the proposition, bearing in mind at the same time, that it was a capital offence.

There were two chemist's reports, stating that the substances found by the police and submitted to the chemist for analysis were in fact heroin, such substances having been found to be attributable to the accused.

The evidence about the chemist's reports is as follows. Insp. Mohd. Sakri bin Ariffin, (PW1), stated that he had personally sent the exhibits, in two envelopes, marked "S1" and "S2" respectively to the Chemistry Department, "S1" consisting of substances suspected to be heroin and "S2", the weighing scale and its case, (container). He produced the acknowledgment receipt he received from the chemist. On April 14, 1984, he received the said exhibits back from the chemist with chemist's reports in respect of the said "S1" and "S2" and marked by the Court respectively as P25 and P26. He further said, in regard to them:

"Both P25 and P26 were served by DPC Yunan at Taiping prison. On the same date in the evening, I received P25 and P26 with acknowledgment of receipt signed by the accused on both original and copy of each of the reports. This is the acknowledgment."

Exhibit P25 left one in no doubt that the substances analysed by the chemist were heroin and P26 stated that traces of a substance which the said case (container) for the weighing scale or instrument was said to contain were in fact heroin.

It is to be borne in mind that one would expect DPC Yunan to be called because it was he, and not Insp. Mohd. Sakri who had served the chemist's reports, (P25 and P26), on the accused. When the prosecution closed its case, learned defence counsel informed the Court that he would reserve his submission till the end of the whole case. The Court then recessed, if I am not mistaken, for a short while to consider whether there was a *prima facie* case for the defence to be called.

While going through the notes of evidence, it was found that the said DPC Yunan had never given evidence about the service by him of P25 and P26 on the accused.

When hearing resumed, the Court drew the attention of the learned Deputy to the above matter. He very promptly applied for leave under section 425 of the Criminal Procedure Code for the Court to summon the said DPC Yunan, and he appeared to be as surprised as the Court, and the learned defence counsel, who had chosen, it will be remembered, not to make a submission of no case to answer earlier. Learned defence counsel objected vigorously to the application for such leave.

Learned defence counsel submitted to the effect that if DPC Yunan was not called, Insp. Sakri's evidence about service of P25 and P26 on the accused would be hearsay evidence. DPC Yunan, to make the matter worse, was not even offered to the defence at the close of prosecution case, and that oversight by the learned Deputy 'could not be converted into something prejudicial to the accused who was fighting for his life,' and if the learned Deputy was excused from this oversight, the result might be the death of the accused. Section 425, relied on by the prosecution, conferred a discretion to be exercised judicially, not after the close of the prosecution case but before such close of the prosecution case. He urged the Court not to call the additional witness. *i.e.* DPC Yunan.

The learned Deputy submitted that if it was essential to the just decision of the case, the Court had a discretion under the said section 425 which did not say whether the discretion should be exercised before or after the close of prosecution case. He cited *Ramli bin Kechik* v. *Public Prosecutor.*[1] He also cited the unreported case of *Public Prosecutor* v. *Yeoh Chuan Joo*[2] where Shaik Daud J. invoked the same section by recalling two witnesses after the prosecution case. He urged the Court to allow the application.

I must mention that the learned Deputy who had conducted other cases before me, is undoubtedly a competent prosecuting counsel, very efficient but fair. The failure to call DPC Yunan, was entirely a matter of pure inadvertence and all I can say is that a mistake will happen to the most careful of men.

The system in our criminal trials is adversarial, and it behoves the Court, from its inherent nature, to take no active part in proving or disproving any essential fact for the prosecution or defence, in order to maintain its impartiality on the basis of which, public confidence is cultivated, and on such public confidence, the whole judiciary is rooted.

Again, the cardinal rule is that the prosecution must prove every ingredient of the offence before an accused person is called upon to enter on his defence. To prove any ingredient, there must be sufficient evidence, irrespective of whether it is required or not to prove such an ingredient beyond a reasonable doubt.

In my judgment, the service of P25 and P26, (the chemist's reports), had not been sufficiently proved at the close of the prosecution case because DPC Yunan who served them on the accused had not come forward to testify the same. Such a glaring gap in the chain of the prosecution case could not be ignored or filled up by the evidence of Insp. Mohd. Sakri whose evidence, in particular, as comprised in the quoted passage – the vital and actual evidence about service of P25 and P26, would appear to be hearsay evidence and therefore would have to be eradicated from the Court's mind when the prosecution case closed without calling DPC Yunan.

Without such evidence, there was no evidence of service of P25 and P26 on the accused, and neither the chemist was called to the stand, the position after the close of prosecution was tant-

amount to having no evidence that the suspected substances and the traces of some substance found on the container or case for the weighing scale were in fact heroin. There was no sufficient evidence to prove the essential ingredient that the substances the accused was alleged to have trafficked in were in fact heroin.

The next question that arose was whether I should exercise my discretion in invoking section 425. The cardinal rule about the prosecution having had to have sufficient evidence to prove every ingredient of the offence by the close of the prosecution case was clearly broken in this case by a most unfortunate oversight. Viscount Sankey L.C., *Maxwell* v. *The Director of Public Prosecutions,*[3] had this to say:

"It must be remembered that the whole policy of English Criminal Law has been to see that as against the prisoner every rule in his favour is observed and that no rule is broken so as to prejudice the chance of the jury trying the true issues. The sanction for the observance of the rules of evidence in criminal cases is that, if they are broken in any case, the conviction may be quashed ... It is often better that one guilty man should escape than that the general rules evolved by the dictates of justice for the conduct of criminal prosecutions should be disregarded and discredited."

The spirit of the criminal law was thus highlighted, and the quoted passage should, in my view, prevail over the oft-quoted *dictum* that there is justice also for the victim of the crime, apart from justice for the accused. The statement of Viscount Sankey would be particularly trenchant when a case of capital offence is involved, so that if a mistake is made, and a warrant of execution is carried out, it is absolutely irreversible.

Having regard to all the circumstances, including my view on the effect of our system of trial being adversarial, I did not think I should exercise my discretion by invoking section 425 of the Criminal Procedure Code, I therefore declined to exercise it.

Having said this, though not strictly necessary, but out of deference to the learned Deputy, I think I ought to comment on the two cases cited by him. The first case of *Ramli bin Kechik* is distinguishable, because section 425 was invoked during the course of prosecution case and not after its close. To invoke the section 425 after the close of prosecution case would, in my view, amount to the Court descending to the arena. The second unreported case is also distinguishable because it was concerned with recall of witnesses.

In the circumstances, I acquitted and discharged the accused without calling for his defence.

Accused acquitted and discharged.

Solicitors: *Karpal Singh & Co.*

UNITED ORIENTAL ASSURANCE SDN. BHD. v. NG KING SEE

[A.C.J. (Yusoff Mohamed J.) December 28, 1986]
[Johore Bahru – Civil Suit No. 273 of 1980]

Insurance – Motor vehicle – Insurance policy containing condition that insurers not liable if vehicle driven by person below 21 years old – Fatal accident – Vehicle of insured driven by person aged 20 – Estate commenced action against insurers – Insurers' counsel consenting to judgment against insured without latter's retainer – Whether counsel's conduct wrongful – Setting aside judgment in default of appearance – Whether delay of 3 years reasonable.

The defendant obtained an insurance policy from the plaintiffs against third party risks in respect of his motorcar, JK9189. The vehicle was involved in an accident and the driver was one Tan, aged 20, authorized by the defendant. The plaintiffs contended that it was a condition of the insurance policy that they would not be liable *inter alia* if the insured vehicle was at the time of the accident driven by a person below the age of 21 years. The victim of the accident died and his estate commenced proceedings against the insurers in Johore Bahru High Court where settlement was reached at $29,000 and consented to on September 23, 1979, by the plaintiffs' counsel, who was not retained by the defendant. Judgment was entered against the defendant for $29,000. The plaintiffs paid this sum to the estate and now seek to recover it as reimbursement from the defendant for money paid on his behalf. The Senior Assistant Registrar found in favour of the plaintiffs in the suit and dismissed the defendant's application filed on June 10, 1985, to set aside the judgment in default of appearance entered on August 24, 1982. The defendant appealed to the Judge against the decision of the Senior Assistant Registrar.

Held, allowing the appeal: (1) by repudiating the policy, the plaintiffs ceased to be bound by the contract. In the absence of proper retainer by the defendant, it was wrongful for the plaintiff's counsel to consent to the settlement on behalf of the defendant on the claim against his interest. The fact that the defendant had earlier knowledge of the claim against him is irrelevant. Clearly there is some evidence of abusing the process of the court;

(2) although the delay of nearly 3 years in making the application to set aside the judgment was necessarily long, the defendant has given reasonable grounds challenging the substituted service of the writ. There are also points of law raised which are of public interest whether such manipulation by the insurers would bind the defendant. The plaintiffs are not in any way prejudiced by the delay. This is therefore a fit case to disregard the lapse of time;